Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

# Supreme Court of the United States

**October Term 1996**

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**FRED STALLWORTH,**

***Petitioner,***

**v.**

**ALEXIS M. HERMAN, SECRETARY, DEPARTMENT OF LABOR,**

***Respondent.***

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**On Petition for Writ Of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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42 pp

## QUESTIONS PRESENTED

Whether, under the mandatory language of the Equal Employment Opportunity Commission regulations for processing discrimination complaints against federal agencies, 29 C.F.R. § 1613.214, 215 (1995), an agency waives its untimeliness defense by deciding a complaint on the merits without inquiring if the employee exhausted administrative remedies or has shown reason to extend the applicable time limits.

Whether, as alternative relief, the judgment should be vacated and this case remanded to the United States Court of Appeals for the District of Columbia Circuit, for reconsideration in light of *Bowden v. United States*, 106 F.3d 433, 438 (D.C. Cir. 1997), in which the court held that an agency waived any untimeliness defense by deciding an administrative complaint on the merits without ever questioning its timeliness.

## PARTIES TO THE ACTION

*Plaintiff*

Fred Stallworth

*Defendant*

Alexis M. Herman, in her official capacity as Secretary, Department of Labor

## Rule 29.6 Statement

Pursuant to Supreme Court Rule 29.6, Petitioner Fred Stallworth discloses that he is not a corporate entity and therefore has no parent company or subsidiaries.

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SUPREME COURT OF THE UNITED STATES

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On Petition for Writ Of Certiorari
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for the District of Columbia Circuit

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# PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit dated January 7, 1997, is unreported and is reproduced at pages 1 through 5 of the appendix to the petition ("App."). The unreported Order denying petitioner's petition for rehearing, dated March 10, 1997, is reproduced at App. 6. The unreported Order denying petitioner's suggestion for rehearing *en banc*, dated March

10, 1997, is reproduced at App. 7. The unreported Order of the United States District Court for the District of Columbia, dismissing petitioner's Complaint with prejudice, dated July 19, 1995, is reproduced at App. 8.

The Department of Labor's final decision, rejecting petitioner's claims of discrimination, dated March 10, 1992, is reproduced at App. 9. That final agency decision incorporated in full the Department's proposed decision dated February 13, 1992, which is reproduced at App. 12.

## BASIS FOR JURISDICTION

The judgment or order by the United States Court of Appeals for the District of Columbia Circuit for which petitioner seeks review was entered on January 7, 1997. The Orders denying petitioner's timely petition for rehearing and suggestion for rehearing *en banc* were entered March 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## REGULATIONS INVOLVED

**§ 1613.214 Filing and processing of complaint.**[1]

(a) *Time limits.* (1) . . . The agency may accept the complaint for processing in accordance with this subpart only if:

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[1] Cases pending after October 1, 1992 are governed by 29 C.F.R. § 1614.101 *et seq.* (1996), rather than the regulation set out in the text. The updated regulation allows 45 days in which to consult a counselor. Otherwise, for the purpose of this petition, the substance of the regulation remains unchanged. A decision here would resolve the identical issue for post-1992 cases.

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action; . . . .

. . . .

(4) The agency shall extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency.

29 C.F.R. § 1613.214 (1995).

**§ 1613.215 Rejection or cancellation of complaint:**

(a) The agency head or designee shall reject or cancel a complaint:

. . . .

(4) That is filed untimely, unless the agency extended the time limits in accordance with § 1613.214(a)(4);

29 C.F.R. § 1613.215 (1995).

## STATEMENT OF THE CASE

### A. Administrative Proceedings

The Department of Labor ("agency") denied Mr. Stallworth per diem benefits which the agency routinely pays to employees detailed outside the employee's commuting area. Mr. Stallworth, an African-American male, contended the denial was motivated by unlawful discrimination.

Mr. Stallworth consulted an Equal Employment Opportunities counselor on August 16, 1989, and thereafter filed an administrative civil rights complaint under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). The agency accepted the discrimination charge for investigation in a letter defining the issue as whether Mr. Stallworth was discriminated against when on August 14, 1989, when he received notification that the agency would not pay his per diem claim.

The agency denied the discrimination charge entirely on the merits without any mention of any claimed failure to timely contact a counselor or to exhaust administrative remedies. The agency's proposed decision, dated February 13, 1992, defined the issue as "whether you were discriminated against . . . when, on August 14, 1989, you received notification [that per diem would not be paid]." App. 12. The agency's final decision, issued March 10, 1992, incorporated the proposed decision. App. 9. The agency failed to address any issue of timeliness and thus never specifically stated whether it found cause to extend the time limits pursuant to the regulations.

## B. Court Proceedings Below

Mr. Stallworth filed suit in the United States District Court. Once in court, the agency asserted for the first time that Mr. Stallworth had not timely contacted a counselor and thus failed to exhaust his administrative remedies. Judge Thomas P. Jackson dismissed the complaint on the government's summary judgment motion. The dismissal was based solely on failure to exhaust remedies due to failure timely to contact a counselor. This was the only issue raised in the motion. The District Court did not explain its decision. App. 8.

Mr. Stallworth appealed to the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Stallworth filed a Motion for Summary Reversal and the agency sought summary affirmance. Both motions were denied.

After full briefing and oral argument, the panel affirmed in an unpublished *per curiam* opinion, holding that the 30-day period in which to consult a counselor began not later than September 9, 1988. App. 4. Although the court did not expressly address Mr. Stallworth's argument that the agency waived its exhaustion defense by deciding the complaint on the merits and failing to address timeliness issues, the court stated:

> Although an EEOC regulation required the Department to reject a complaint that it deemed untimely, 29 C.F.R. § 1613.215(a)(4) (1995), the fact that the fact that the Department chose to investigate the problem itself in 1988 and 1989 does not preclude it from raising the timeliness defense here. The

> Department did not delay in raising the defense before the district court, and Stallworth has not been prejudiced by the agency's decision to investigate the merits of his complaint." *Cf. Brown v. Marsh*, 777 F.2d 8, 15 (D.C. Cir. 1985).

Slip. Op. at 3. App. 4.

The court denied Mr. Stallworth's petition for rehearing and suggestion for rehearing *en banc*. App. 6 & 7. The sole argument presented in the petition for rehearing and suggestion for rehearing *en banc* was that the agency's investigation and final decision on the merits meant that the complaint was timely or that the agency had waived any timeliness defense. This petition followed.

### C. *Bowden v. United States*

On February 18, 1997, one day before petitioner filed his petition for rehearing and suggestion for rehearing *en banc*, the District of Columbia Circuit decided *Bowden v. United States*, 106 F.3d 433 (D.C. Cir. 1997) (Tatel, J.). *Bowden* stated:

> Although agencies do not waive a defense of untimely exhaustion merely by accepting and investigating a discrimination complaint, we have suggested that if they not only accept and investigate a complaint, but also decide it on the merits—all without mentioning timeliness—their failure to raise the issue in the administrative process may lead to waiver of the defense when the complainant files suit.

*Id.* at 438. (Citations omitted). The *Bowden* court held that the government had waived its exhaustion defense in a case in which the pertinent facts at the administrative level were indistinguishable from those of the instant case.[2] The *Bowden* court stated that because the agency dealt with the merits of Bowden's complaint without questioning timeliness, the agency lacked a legitimate reason to complain about a judicial decision on the merits. *Id.* at 438-439.[3]

## REASONS FOR GRANTING THE PETITION

### A. The Agency Ignored a Mandatory Duty; The Result Burdens Petitioner and the Federal Courts

The Equal Employment Opportunity Commission ("EEOC") by regulation established detailed administrative procedures for federal agencies to follow in enforcing the rights of their employees under Title VII. For cases filed after November 30, 1987, the regulations mandate that agencies "*shall*" reject complaints not brought to the attention of an Equal Employment Opportunity counselor within 30 calendar days of the date the discrimination became manifest. 29 C.F.R. § 1613.215(a)(4).

According to the regulatory history, EEOC "redrafted subsection (a) to *require* rejection or cancellation in seven instances." 52 *Fed. Reg.* 41920 (October 30, 1987) (Emphasis

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[2] *Bowden* also presented the issue of government conduct constituting waiver once the lawsuit was filed.

[3] *Bowden* was not published until after the Court denied the Petition for Rehearing.

added). Thus, the change to mandatory language was not inadvertent.

The regulation expressly requires the agencies to accept untimely complaints in several instances including "for other reasons considered sufficient by the agency." 29 C.F.R. § 1613.214(a)(4) (1995).

Prior to November 30, 1987, the regulation gave federal agencies discretion to accept or to reject untimely complaints. The Fifth Circuit held that mere agency acceptance and investigation of a tardy complaint did not create a waiver unless the agency found discrimination on the merits. *Oaxaca v. Roscoe*, 641 F.2d 386, 390 (5th Cir. 1981).[4]

The District of Columbia Circuit, in *Brown v. Marsh*, 777 F.2d 8, 15 (D.C. Cir. 1985), noting that under the then current version of 29 C.F.R. § 1613.215, an agency "had the power to reject any complaints it considered untimely," opined that the court was "loath to hold that mere investigation without more constitutes a binding waiver of any agency's right to raise the timeliness issue." *Id.*

Despite the express change in language from "may" to "shall," which plainly directs federal agencies either to reject untimely complaints or to accept them for reasons the agency considers sufficient, many agencies still adjudicate the merits of their employees' civil rights complaints without ever addressing the issue of timeliness. Federal agencies routinely

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[4] The *Oaxaca* reasoning was relied upon in *Saltz v. Lehman*, 672 F.2d 207, 208 (D.C. Cir. 1982) and *Boyd v. United States Postal Service*, 752 F.2d 410, 414 (9th Cir. 1985).

ignore their legal duty to expressly decide whether employment discrimination cases brought before them were timely or whether good cause existed to extend the time limits.

When such cases reach the district courts, the government raises an exhaustion of remedies defense as a matter of course. The parties then litigate the timeliness issue as well as the merits. The administrative record sharpens the issues before the court and eases the burden of discovery on the merits. However, no agency record exists to illuminate the exhaustion issue, and the parties often engage in substantial discovery on the timeliness question.

District courts are forced to decide the timeliness without an agency record to rely on. Often the timeliness issue involves complex factual considerations and raises equitable considerations which under the regulations should have been fully explored by the agency.

In court, the EEOC's administrative time limits function like statutes of limitations, *Bowden*, 106 F.3d at 437. Therefore, in ruling on the government's exhaustion defense, the district courts may consider equitable tolling, estoppel and waiver only to the extent they would defeat a statute of limitations defense, and they do so only sparingly. *Irvin v. Veterans Admin.*, 498 U.S. 89, 96 (1990). The court's discretion is far more limited than that of the agencies which expressly have the power to waive time limits "for other reasons considered sufficient by the agency." 29 C.F.R. § 1613.214(a)(4) (1995).

### B. The Growing Caseload in the Federal Courts Makes this Issue Ripe for Adjudication

Employment civil rights cases threaten to clog the federal courts. While civil appeals increased six percent from fiscal 1995 to 1996, civil rights employment cases increased 17 percent. Mecham, *1996 Judicial Business of the United States Courts*, 12.

Between 1992 and 1996, civil rights employment cases grew from 4.9% to 8.75% of the total civil caseload commenced in U.S. District Courts. *Id.*, Table C-2A U.S. District Courts Civil Cases Commenced, by Nature of Suit During the 12 Month Periods Ended December 31, 1992 through 1996, at 139.

In the fiscal year ending September 1996, plaintiffs filed 1,209 new employment civil rights cases against the United States. *Id.*, Table C-2 U.S. District Courts Civil Cases Commenced, by Jurisdiction and Nature of Suit, During the Twelve-Month Period Ended September 30, 1996, at 135. While few such cases result in published decisions, even a cursory examination of reported cases demonstrates that district judges are required to adjudicate the timeliness issues in a substantial percentage of these cases.

For a sampling of recent reported federal sector decisions by district courts on timeliness grounds with no citation to an administrative determination on the timeliness issue,[5] see, *e.g.*, *Baker v. Runyon*, 951 F. Supp. 90, 91 (E.D.N.C. 1996); *Counts v. Reno*, 949 F. Supp. 1478, 1482

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[5] Cited cases are those reported in the last 11 bound Federal Supplement volumes.

(D. Haw. 1996); *Cones v. Shalala*, 945 F. Supp. 342, 346 (D.D.C. 1996); *Bailey v. West*, 941 F. Supp. 1023, 1025 (D. Kan. 1996). The only published case within that category to mention the existence of an administrative determination as to timeliness was *Albritton v. Kantor*, 944 F. Supp. 966, 969 (D.D.C. 1996).

The issue is of exceptional importance because of the sheer number of cases filed in the federal district courts and the apparent widespread non-compliance by federal agencies with the governing regulation regarding timeliness. Were this Court to hold that the complete failure to comply with the regulations would result in waiver of any timeliness defense, federal agencies would be on notice they are required to decide the timeliness issue in every civil rights employment case brought by federal employees. The resulting change in agency behavior would ease the burden on the district court judges and on the courts of appeal which are required to decide issues that should be decided by the agencies.

Therefore, this is an ideal case for the Court to exercise its supervisory powers. With relatively little effort, the Court would ensure that federal agencies obey their mandate to decide in the first instance whether employment discrimination cases brought before them were filed timely or whether good cause existed to extend time limits. Such a ruling would be simple to comprehend and administer and would encourage more efficient use of judicial resources in the district courts (and also in the courts of appeals), and permit courts to devote more energies to deciding the merits rather than exhaustion issues belatedly asserted by the government.

Greater scrutiny of timeliness issues at the agency level would benefit federal employees who miss a deadline for good cause because the employees would be given the opportunity to argue their equitable case before agency adjudicators possessing plenary discretion to grant them relief.

### C. The Circuits Differ in Deciding Whether An Agency's Waiver Must Be Express

Although Mr. Stallworth's appeal was rejected, the District of Columbia Circuit is moving toward a consistent view that agencies waive a timeliness defense when they fail to raise it at the agency level. The result in *Bowden* is consistent with language found in *Wilson v. Pena*, 79 F.3d 154, 165 (D.C. Cir. 1996) (Rogers, J.), as follows:

> Where the agency has taken final action based on an evaluation of the merits, it cannot later contend that the complainant failed to exhaust his remedies.

(footnote omitted). *Wilson* construed a companion subsection of the regulation at issue here, 29 C.F.R. § 1613.215(6) (1995), which permits an agency to reject or cancel a complaint for failure to prosecute.

*Bowden*, 106 F.3d at 438, also cited the dissent in *Brown v. Marsh*, 777 F.2d 8 (D.C. Cir. 1985), in which then Judge Starr stated:

> the time limits at issue here are purely administrative. Thus, for example, it is doubtful that an agency could successfully assert a non-compliance with its time limits as

> a ground for dismissal if the agency accepted, investigated and decided the merits of a complaint without ever raising the timeliness issue. *Cf. Saltz v. Lehman*, 672 F.2d 207 (D.C. Cir. 1982). But such a case is not before us.

*Brown*, 777 F.2d at 18 n. 2.

However, the decisions of other circuits, while not directly addressing the precise issue raised here, suggest the opposite: for waiver to be found, there must be at least an express finding of timeliness by the agency or even a final unappealed EEOC determination. *Girard v. Rubin*, 62 F.3d 1244, 1247 (9th Cir. 1995); *Briones v. Runyon*, 101 F.3d 287 (2d Cir. 1996) (both cases held in favor of the employee on a waiver theory).

### D. The D.C. Circuit's Decision Disregards The Plain Meaning of "Shall" in the Regulation

This Court should grant Mr. Stallworth's petition because the case was wrongly decided in the courts below.

The agency was on notice of its obligation to decide the timeliness issue one way or the other, and it was in the best position to do so in the first instance. It was given a full opportunity to question all aspects of Mr. Stallworth's claim when it investigated the facts underlying the complaint and then chose to base its decision on the merits. Its decision included an express recitation that the issue it was deciding was "whether you were discriminated against . . . on August

14, 1989."[6] Had the agency found Mr. Stallworth's claim untimely, its obligation would have been to determine whether to extend the time limits for reasons the agency considered sufficient.

The plain language of the EEOC regulation requires an agency to reject or cancel complaints that are not timely unless the deadline has been extended. Under the plain language of the regulations, if the agency processes the complaint, it follows that such complaint was timely or that the agency waived the time limits for one of several reasons: that Mr. Stallworth was not notified of the time limits and was not otherwise aware of them; that Mr. Stallworth was prevented by circumstances beyond his control from submitting the matter within the time limits; or that the deadlines were waived "for other reasons considered sufficient by the agency." 29 C.F.R. § 1613.214.

The panel's citation to *Brown v. Marsh supra*, is surely misplaced. Under the EEOC regulations applicable to *Brown*, the agency had the discretion to accept untimely complaints, but was not bound by its decision under the plain language of the regulations. According to the regulations applicable to *Brown*, the processing of an untimely complaint had no legal consequences or significance in court.

Enforcement of the plain language of the regulations would make binding the agency's own failure to raise the timeliness issue in the administrative process.

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[6] August 14, 1989 was two days before Mr. Stallworth consulted a counselor.

Failure to treat the agency's finding on the merits as a waiver of a right to later bring a timeliness defense denied Mr. Stallworth the right to be heard by the entity with plenary authority to extend those time limits as to his reasons for consulting a counselor when he did.

## CONCLUSION

This case raises an important issue regarding the interpretation of regulations applicable to all federal employees who file complaints of employment discrimination. For the reasons stated in the Petition For A Writ of Certiorari, this Court should grant the Petition and reverse the decision below.

In the alternative, petitioner requests this Court to vacate the judgment and remand this case to the United States Court of Appeals for the District of Columbia Circuit, for reconsideration in light of *Bowden v. United States*, 106 F.3d 433, 438 (D.C. Cir. 1997).

Respectfully submitted,

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# APPENDIX

**SUPREME COURT OF THE UNITED STATES**

**October Term 1996**

**FRED STALLWORTH,**

***Petitioner,***

**v.**

**ALEXIS M. HERMAN, SECRETARY DEPARTMENT OF LABOR,**

***Respondent***

# APPENDIX

*Stallworth v. Reich*, No. 95-5268 (D.C. Cir. Jan. 7, 1997) . . . . . 1a

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Letter to Mr. Fred Stallworth dated February 13, 1992 (proposed administrative decision) . . . . . 12a

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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**No. 95-5268** **September Term, 1996**
92cv00894

FRED STALLWORTH,
*APPELLANT*,

v.

ROBERT B. REICH, IN HIS OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF LABOR,
*APPELLEE*.

[United States Court of Appeals
For the District of Columbia Circuit
**FILED** JAN 07 1997]

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Appeal from the United States District Court
for the District of Columbia

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Before: SENTELLE, RANDOLPH, and ROGERS, *Circuit Judges*.

## JUDGMENT

This appeal from the district court, having been briefed and argued, warrants only an abbreviated disposition pursuant to D.C. CIR. R. 36(b). The appeal concerns whether the district court properly granted the Secretary's motion for

summary judgment of Stallworth's claims of race, age, color, and sex discrimination, and retaliation. In its July 19, 1995, Order, the district court ruled that Stallworth's claims were untimely, and that he failed to exhaust his administrative remedies.

In September 1987, Stallworth, a Program Analyst at the Department of Labor's Employment and Training Administration, applied for an assignment under the Intergovernmental Personnel Act to the Dade County Department of Human Resources in Miami, Florida. Under the 'transfer agreement' that he signed on October 7, 1987 -- but that the Department of Labor ("the Department") did not -- he was to receive per diem and travel benefits in the sum of $14,717 for his one-year stay in Florida. On October 27, 1987, the Department did reach an agreement with Stallworth. The Government claims that the October 27, 1987, agreement eliminated the per diem benefits. Stallworth claims that it did not; that it awarded the same travel benefits as the earlier document; and that the Department unilaterally inserted new terms into the October 27, 1987, agreement after he signed it.

Stallworth inquired about the reasons for what he considered alterations to the agreement -- alleged alterations that disallowed per diem benefits. He exchanged correspondence with the Department regarding this matter through the middle of 1989. For example, in his July 22, 1988, letter to David 0. Williams, Administrator of the Employment and Training Administration, Stallworth stated: "I still have not been told why I am not receiving the per diem, or of the reasons that I won't be receiving it." On September 9, 1988, the Department's Director of Office of Management Support replied that the awarding of per diem expenses "is not obligatory," and that the "travel authorization" of October 27,

1987, which did not include the per diem expenses, "reflects the expenses authorized by this agreement."

Stallworth asserts that he did not know that he was finally being denied these benefits until a July 28, 1989, meeting with Williams' assistant, Sidney Waldstreicher, who told Stallworth that "Williams had instructed him to state that the time" Stallworth "spent in Miami was a 'bad dream and that it never happened.'" Brief for Appellant at 11 (filed Oct. 2, 1996). Stallworth claims that through "the words and actions of Mr. Waldstreicher . . . it became clear to" him "that he had not merely been caught in a bureaucratic quagmire" and that "he had been discriminated against through the denial of his full per diem." *Id.* Stallworth met with an Equal Employment Opportunity counselor and filed an informal complaint on August 16, 1989.

Under then-existing regulations for race, age, color and sex discrimination brought by federal employees, an agency could only accept a complaint for processing if the "complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date . . . that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action." 29 C.F.R. § 1613.214(a)(1)(i) (1995). That same section required an agency to "extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency." *Id.* § 1613.214(a)(4) (1995). "The agency head or designee shall

reject or cancel a complaint" that "is filed untimely, unless the agency extended the time limits in accordance with" the aforementioned section. *Id.* § 1613.215(a)(4) (1995).

In light of the September 9, 1988, letter discussed above, Stallworth, by at least that time "reasonably should have known of the" alleged "discriminatory event or personnel action." 29 C.F.R. § 1613.214(a)(1)(i) (1995). In fact his letter several weeks earlier, on July 22, 1988, shows that he knew per diem benefits would not be paid. Nothing in the subsequent meeting with Waldstreicher indicates any discriminatory animus that could possibly warrant tolling the deadlines. *Cf. L[illegible] v. Heckler,* 768 F.2d 409, 418 (D.C. Cir. 1985). Althougn an EEOC regulation required the Department to reject a complaint that it deemed untimely, 29 C.F.R. § 1613.215(a)(4) (1995), the fact that the fact that the Department chose to investigate the problem itself in 1988 and 1989 does not preclude it from raising the timeliness defense here. The Department did not delay in raising the defense before the district court, and Stallworth has not been prejudiced by the agency's decision to investigate the merits of his complaint. *Cf. Brown v. Marsh,* 777 F.2d 8, 15 (D.C. Cir. 1985).

Stallworth concedes that he never filed a complaint for so-called "retaliation" in 1990 and 1991, when, he alleges, the Department improperly computed his workmen's compensation benefits. Even if an unexhausted retaliation claim could be bootstrapped onto an untimely underlying claim, *but see, e.g., Jones v. Runyon,* 91 F.3d 1398, 1402 (10th Cir. 1996), at "a minimum," the claim of retaliation for filing a discrimination claim "must arise from the administrative investigation that can reasonably be expected to follow the" underlying "charge of discrimination," *Park v.*

*Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995) (quotation omitted). Stallworth's "retaliation" claim involved completely different persons and events from his underlying claims. It therefore constituted, at best, an allegation of separate discrimination requiring separate exhaustion.

**ORDERED AND ADJUDGED,** by the court, that the district court order is affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. *See* D.C. Cir. R. 41.

Per Curiam
**FOR THE COURT**
Mark J. Langer, Clerk

BY: s/ Eva Brown
Deputy Clerk

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

**No. 95-5268** **September Term, 1996**
92cv00894

Fred Stallworth,
*Appellant*,

v. **FILED MAR 10 1997**

Robert B. Reich, in His Official Capacity as
Secretary, United States Department of Labor,
*Appellee*.

**BEFORE:** Sentelle, Randolph, and Rogers, *Circuit Judges*.

## ORDER

Upon consideration of appellant's petition for rehearing filed February 18, 1997, it is

**ORDERED** that the petition be denied.

Per Curiam

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

**No. 95-5268** **September Term, 1996**
92cv00894

Fred Stallworth,
*Appellant*,

v.

**FILED MAR 10 1997**

Robert B. Reich, in His Official Capacity
as Secretary, United States Department of Labor,
*Appellee*.

**BEFORE:** Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges.

## ORDER

Upon consideration of appellant's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the suggestion be denied.

Per Curiam

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| FRED STALLWORTH, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Civil Action No. 92-0894 |
| | ) | (TPJ) |
| ROBERT B. REICH, | ) | |
| Secretary of Labor, | ) | **Filed JUL 19 1995** |
| | ) | Clerk, U.S. District Court |
| Defendant. | ) | District of Columbia |

ORDER

Upon consideration of defendant's motion for summary judgment and plaintiff's opposition thereto, for essentially the reasons set forth by defendant, it is, this 19th day of July, 1995,

ORDERED, that defendant's motion for summary judgment is granted, and the complaint is dismissed with prejudice.

s/ Thomas Penfield Jackson
U.S. District Judge

**U.S. Department of Labor**

Office of the Assistant Secretary
for Administration and Management
Washington, D.C. 20210

MAR 10 1992

CERTIFIED LETTER -- RETURN RECEIPT REQUESTED

Mr. Fred Stallworth
1515 Jefferson Davis Hwy., # 413
Arlington, VA 22202

DCR Case No. 0-11-004

Dear Mr. Stallworth:

As the departmental official designated by the Secretary of Labor to make agency decisions in cases alleging discrimination under the Equal Employment Opportunity (EEO) Program, I hereby submit my final decision on your complaint. This decision is issued pursuant to 29 CFR 1613.217(d) of the EEO regulations, because you did not request a hearing to be held by an Equal Employment Opportunity Commission (EEOC) Administrative Judge. Instead, by your February 28, 1992 letter to Ms. Annabelle T. Lockhart, you requested a final disposition on your complaint.

It is my final decision to adopt in full the Department's proposed decision issued by Ms. Betty Bolden on February 13, 1992, which found that you were not discriminated

against by the Employment and Training Administration (ETA).

This is a final agency decision on your complaint. If you are dissatisfied with the decision, you may file a notice of appeal with the Equal Employment Opportunity Commission (EEOC), at anytime up to twenty (20) calendar days after your receipt of this decision. The appeal should be submitted to EEOC's Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. Any statement in support of the appeal must be submitted to the Commission and to this office within thirty (30) calendar days of filing the notice of appeal. The Commission may exercise its discretion to extend the time limit and accept the appeal if it is not submitted within the time limit, based upon a written showing that you were not notified of the prescribed time limit and were not otherwise aware of it, or that circumstances beyond your control prevented filing the notice of appeal within the prescribed time limit. If you elect not to appeal to the Commission, you may file a civil action in an appropriate U.S. District Court within thirty (30) calendar days of your receipt of this decision.

If you file an appeal with the Commission, you may still file a civil action in an appropriate U.S. District Court within thirty (30) calendar days of your receipt of the Commission's final decision on your appeal.

A civil action may also be filed anytime after one hundred and eighty (180) calendar days from the date of filing your appeal to the Commission, if a final decision has not been issued by the Commission's Office of Federal Operations.

If you choose to file a civil action, and you do not have, or are unable to obtain the services of a lawyer, you may request the court to appoint a lawyer to represent you. In such circumstances as the court may deem just, the court may appoint a lawyer for you and may authorize the commencement of the action without payment of fees, costs or security. Any such request must be made within the above-referenced 30-day time limit and in such form and manner as the court may require.

You are further notified that if you file a civil action, you must name the appropriate Department or Agency head as the defendant. Failure to name the head of the Department or Agency may result in the loss of any judicial redress to which you may result in the loss of any judicial redress which you may be entitled. The head of the Department of Labor is Lynn Martin, Secretary of Labor.

Sincerely,

s/ THOMAS C. KOMAREK
Assistant Secretary for
Administration and Management

**Department of Labor**

Office of the Assistant Secretary
for Administration and Management
Washington, D.C. 20210

Reply to the Attention of:

CERTIFIED LETTER – RETURN RECEIPT REQUESTED

FEB 13 1992
Mr. Fred Stallworth
1515 Jefferson Davis Highway
Apartment #413
Arlington, VA 22202

DCR Case No. 0-11-004

Dear Mr. Stallworth:

As the departmental official designated by the Secretary of Labor to issue proposed decisions on complaints alleging discrimination under the Equal Employment Opportunity (EEO) Program, I hereby submit my proposed decision on your EEO complaint pursuant to 29 C.F.R. § 1613.217(c).

Your complaint raises the issue of whether you were discriminated against on account of your race (Black), color (Black), age (55), and sex (male) when, on August 14, 1989, you received notification that Employment and Training Administration (ETA) management would not pay your per diem in connection with your Intergovernmental Personnel Act (IPA) assignment (Tab D). Attempts to resolve your complaint informally were unsuccessful.

After careful review and consideration of the facts, statements and documents in the investigative file prepared by the Directorate of Civil Rights (DCR), it is my proposed decision that your complaint of discrimination based on race, color, age and sex is not supported by a preponderance of the evidence. Accordingly, no corrective action is proposed.

You alleged in your complaint that you were discriminated against on account of your race, color, age, and sex because you had been denied the "normal" per diem reimbursement given to employees who were subject to IPA agreements (Tab B, p. 2). Specifically, you allege that while you were denied per diem reimbursement, similarly situated employees were not denied per diem payments pursuant to their respective IPA agreements (Tab E, p. 4).

In addition to allegations of disparate treatment, you alleged the final IPA agreement which bears your signature and those of the appropriate authorizing officials was altered without your knowledge some time after the time you signed the agreement on October 10, 1987 (Tab E, p. 5; Tab N; p. 3). Specifically, you allege that while the final agreement dated October 27, 1987 limited travel reimbursement and provided only five days of per diem payment (Tab – IPA Agreement, Part 12, Item 33), the IPA agreement you signed did not limit travel reimbursement and did not stipulate a timeframe on per diem payment (Tab E, pp. 4, 8). In fact, you claim that at the time you signed the IPA agreement, Part 12, Item 33 of that agreement stated:

> ETA will pay travel expenses to and from assignment location (Washington, D.C. to Miami, Florida). Payment is also allowable for movement of household goods to and from assignment location

> in accordance with Federal regulations as applicable to IPA agreement assignments. Per diem in accordance with ETA Policy will be paid in lieu of movement of household goods (Tab E, pp. 4-5. Tab O).

You conclude that the IPA agreement you signed on October 7, 1987 was subsequently altered to limit per diem payment without your knowledge and without your being informed of this change. (Tab E, p. 5)

Management at ETA denies having discriminated against you on the basis of race, age, color, or gender (Tab F, p. 1). Rather, they contend that refusal to pay your per diem was consistent with the terms of the IPA agreement which you and management had negotiated and signed (Tab F, p. 1). According to the Deputy Assistant Secretary for Employment and Training, under IPA rules, the granting of per diem is discretionary and not mandatory (Id.). Since it was represented to management that you were moving into a residence previously occupied for some period of time by your wife, it was determined that per diem reimbursement was inappropriate after your arrival at the IPA assignment (Id.). Thus, the terms of your IPA agreement were not based on discriminatory factors but discretionary factors of whether per diem payment was necessary under the circumstances.

With respect to allegations that terms of the IPA agreement relating to per diem were altered without your knowledge, the Director of the Office of Management Support explains that while you originally submitted an IPA agreement containing per diem reimbursement for the entire year, his proposal was not entered into by ETA, but rather, a revised agreement limiting per diem reimbursement was negotiated with you on

your return to Washington for this purpose and the final IPA agreement containing this limitation was approved and signed on October 27, 1987 (Tab L, p. 1). In fact, according to the authorizing official who signed the final IPA agreement, the revised agreement was read and signed in your presence (Tab W, p. 2).

Based on an examination of the record, you have not established by a preponderance of the evidence that ETA discriminated against you on account of your race, color, age, and sex when you were notified that ETA would not pay your per diem in connection with your IPA assignment. ETA has offered a legitimate, nondiscriminatory reason for why you were not entitled to the per diem you requested. Specifically, regulations which govern IPA assignments recognize that reimbursement is not mandatory but discretionary based on negotiations between the parties and the particular facts of the situation involved. In your case, the signed agreement reflected that you were entitled to only five days of per diem reimbursement. Further, an examination of the record does not support your allegation that you were disparately treated from similarly situated ETA employees when you were denied per diem reimbursement. Specifically, the decision not to grant your per diem reimbursement was based on permissible discretionary factors and not on discriminatory factors. In addition, decisions to grant or not grant per diem reimbursement to other ETA employees subject to outgoing IPA agreements were also based on permissible discretionary factors pursuant to IPA rules. Finally, there is no documentation that the applicable provisions of the IPA were applied in a discretionary fashion. Accordingly, no corrective action is recommended.

You are advised that within fifteen (15) calendar days after receipt of this letter, you may request that a final disposition be made on the evidence in the investigative report, or you may request that a hearing be conducted by an Equal Employment Opportunity Commission Administrative Judge, with a subsequent decision to be issued by the Assistant Secretary for Administration and Management, upon receipt of the Administrative Judge's recommended decision.

Please address your written request for a final disposition or a hearing to Ms. Annabelle T. Lockhart, Director, Directorate of Civil Rights, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room N-4123, Washington, D.C. 20210.

If you fail to notify the Department of your decision within the 15-day period, the Department will issue a final disposition on your complaint and will so notify you in writing. Upon receipt of such notification, you may appeal to the Equal Employment Opportunity Commission, Office of Federal Operations, P.O. Box 19848, Washington, D.C. 20036, within twenty (20) calendar days or file a civil action in an appropriate U.S. District Court within (30) calendar days.

The EEOC notifies appellants that as to the claims of discrimination under the Age Discrimination in Employment Act (ADEA), and appellant may have up to six (6) years after the right of action first accrued in which to file a civil action. You should be aware, however, that some courts have held that a lesser period applies. In view of the differing court decisions and interpretations of the ADEA concerning the filing of civil actions by aggrieved Federal employees/ applicants, it is suggested that, if your are dissatisfied with the

agency's final decision on your complaint, you promptly contact an attorney knowledgeable in ADEA law in your particular jurisdiction for advice on filing a civil action.

You are further notified that if you file a civil action, you must name the appropriate Department head as the defendant. Failure to name the head of the Department may result in the loss of any judicial redress you may be entitled to. The head of the Department of Labor is Lynn Martin, Secretary of Labor.

Sincerely,

Signed
Betty Bolden
Deputy Assistant Secretary for
Administration and Management

Supreme Court, U.S.
FILED
AUG 6 1997
CLERK

No. 96-1943

# In the Supreme Court of the United States

OCTOBER TERM, 1996

FRED STALLWORTH, PETITIONER

*v.*

ALEXIS HERMAN, SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

WALTER DELLINGER
*Acting Solicitor General*
FRANK W. HUNGER
*Assistant Attorney General*
MARLEIGH D. DOVER
STEPHANIE R. MARCUS
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the court of appeals properly upheld the district court's dismissal of petitioner's complaint as time-barred, even though the agency earlier had chosen to investigate petitioner's claim administratively.

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# In the Supreme Court of the United States

OCTOBER TERM, 1996

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No. 96-1943

FRED STALLWORTH, PETITIONER

*v.*

ALEXIS HERMAN, SECRETARY OF LABOR

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished, but the decision is noted at 107 F.3d 923 (Table). The opinion of the district court (Pet. App. 8a) is unreported.

### JURISDICTION

The court of appeals entered its judgment on January 7, 1997. A petition for rehearing was denied on March 10, 1997. Pet. App. 6a. The petition for a writ of certiorari was filed on June 6, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner Fred Stallworth is a program analyst with the United States Department of Labor (Department). Pet. App. 2a. He alleges that the Department discriminated against him on the basis of his race, color, sex, and age, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), when it denied him per diem reimbursement for work performed in Florida. Pet. App. 2a-3a, 12a; Pet. 4. Petitioner contended that his October 27, 1987, transfer agreement with the Department had originally provided for per diem benefits, but "that the Department unilaterally inserted new terms into the * * * agreement after he signed it." *Id.* at 2a. Petitioner exchanged correspondence with the Department about this matter through mid-1989. *Ibid.*

In a letter dated September 9, 1988, the Department informed petitioner that the payment of per diem reimbursement "is not obligatory," and that the October 27, 1987, agreement set forth the only expenses for which petitioner would be reimbursed. Pet. App. 2a-3a. Petitioner claimed, however, that he was not aware that the agency was denying him the per diem benefits until he met with an agency representative nearly a year later, on July 28, 1989. *Id.* at 3a. On August 16, 1989, petitioner met with an Equal Employment Opportunity (EEO) counselor and filed an informal administrative complaint alleging discrimination. *Ibid.*

2. a. At the time petitioner's claim arose, Equal Employment Opportunity Commission regulations

required persons alleging discrimination to contact the agency's EEO counselor within 30 days of

> the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action.

29 C.F.R. 1613.214(a)(1)(i) (1995).[1] Failure to meet this time limit renders a complaint untimely and bars the individual from filing a Title VII action in district court. See *Brown* v. *General Services Admin.*, 425 U.S. 820, 832-833 (1976). The time limit operates like a statute of limitations, however, and is thus subject to waiver. See *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

b. In March 1992, the Department determined that it had not discriminated against petitioner when it rejected his claim for per diem reimbursement. Pet. App. 9a-11a; see also *id.* at 12a-17a. The Department did not address the timeliness of petitioner's complaint. See *ibid.*

Petitioner subsequently filed suit in the United States District Court for the District of Columbia. The district court dismissed petitioner's complaint, holding that his claims were untimely and that he had failed to exhaust his administrative remedies. See Pet. App. 2a, 8a.

3. The court of appeals affirmed, holding that petitioner's complaint was untimely because he failed

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[1] The current regulation provides that "[a]n aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1) (1996).

to contact the Department's EEO counselor within 30 days. Pet. App. 3a-4a. The court also ruled that the Department's administrative investigation of petitioner's complaint did not waive the defense of untimeliness. *Id.* at 4a ("[T]he fact that the Department chose to investigate the problem itself in 1988 and 1989 does not preclude it from raising the timeliness defense here."). The court of appeals emphasized that "[t]he Department did not delay in raising the defense before the district court, and [petitioner] has not been prejudiced by the agency's decision to investigate the merits of his complaint." *Ibid.*

**DISCUSSION**

Petitioner contends (Pet. 7-15) that the court of appeals erred in holding that the Department's administrative consideration of his complaint did not waive its right to assert a timeliness defense before the district court. Because the court of appeals' unpublished decision is correct and consistent with the rulings of other courts, this argument does not merit further review.

1. The courts of appeals that have addressed the question have consistently held that "[t]he mere receipt and investigation of a complaint does not waive objection to a complainant's failure to comply with the original filing time limit when the later investigation does not result in an administrative finding of discrimination." *Boyd* v. *United States Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985); see also *Rowe* v. *Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992); *Saltz* v. *Lehman*, 672 F.2d 207, 208 (D.C. Cir. 1982); *Oaxaca* v. *Roscoe*, 641 F.2d 386, 390 & n.2 (5th Cir. 1981).

Petitioner suggests (Pet. 12-13) that the courts of appeals are in conflict over whether an agency's finding of timeliness must be express to effect a waiver of the defense, or whether a waiver can be implied from the agency's processing of the complaint. No such conflict exists. The courts agree that, "[i]n order to waive a timeliness objection, the agency must make a specific finding that the claimant's submission was timely." *Rowe*, 967 F.2d at 191; see also *Shea* v. *Tisch*, 870 F.2d 786, 788 (1st Cir. 1989) (per curiam) (where agency expressly found that filing was timely, it waived timeliness defense).

Petitioner espies an emerging conflict between where "the District of Columbia Circuit is moving" (Pet. 12) and the decisions of other circuits "not directly addressing the precise issue raised here" (Pet. 13). This is an insufficient basis for review. The court of appeals' disposition of petitioner's appeal is the best evidence of where the D.C. Circuit "is moving" and, as noted, that decision is consistent with the requirement of an express finding of timeliness to effect a waiver.

Petitioner's citation (Pet. 12) to *Wilson* v. *Peña*, 79 F.3d 154 (D.C. Cir. 1996), is inapt. That case addressed whether a party's failure to provide adequate documentation to an agency constitutes a failure to exhaust administrative remedies. *Id.* at 164-165. The decisions of the Ninth and Second Circuits in *Girard* v. *Rubin*, 62 F.3d 1244 (9th Cir. 1995), and *Briones* v. *Runyon*, 101 F.3d 287 (2d Cir. 1996), which petitioner also cites (Pet. 13), address waiver in the unique situation where the Equal Employment Opportunity Commission and the agency made two express and contradictory findings on timeliness. *Briones*, 101 F.3d at 290-291 (EEOC's express finding of

timeliness trumps agency's express finding of untimeliness and thereby precludes timeliness defense); *Girard*, 62 F.3d at 1247 (same). Both *Girard* and *Briones* reconfirm, moreover, that an express finding of timeliness (which did not occur in the instant case) will waive the timeliness defense.

Petitioner argues that the court of appeals' decision conflicts with its recent opinion in *Bowden* v. *United States*, 106 F.3d 433 (D.C. Cir. 1997). Pet. 6-7, 12, 15. *Bowden* is clearly distinguishable. In *Bowden*, the agency waived its timeliness defense because, "[n]ot only did the [agency] fail to question [plaintiff's] timeliness during the administrative process, but it did not raise the issue either in response to [plaintiff's] initial suit in district court or later when [plaintiff] took his case to the Court of Claims." 106 F.3d at 439. The court also emphasized that "the government's plainly contradictory responses" to plaintiff's complaints in the district court and the Claims Court "prolonged [plaintiff's] quest for resolution of his complaint by three years." *Ibid.*[2] The *Bowden* court, moreover, carefully eschewed the creation of a "sweeping principle concerning waiver of administrative time limits under Title VII." *Ibid.* In any event, even if tension existed between the two D.C. Circuit opinions, an intra-circuit conflict would not warrant this Court's review. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

2. Petitioner also contends (Pet. 7-9, 13-14) that a 1987 amendment of 29 C.F.R. 1613.215(a)(4), requires

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[2] Indeed, by noting (Pet. 7 n.2) that "*Bowden* also presented the issue of government conduct constituting waiver once the lawsuit was filed," petitioner acknowledges one of the crucial differences between the present case and *Bowden*.

agencies to reject untimely complaints and that a failure to do so waives the timeliness defense. This argument is without merit. First, petitioner errs in asserting (Pet. 7-8) that the mandatory language in the 1987 amendment worked a major diminution in agency authority to entertain untimely claims. See 29 C.F.R. 1613.214(a)(1)(i) (1980) ("agency may accept the complaint for processing in accordance with this subpart *only if*" the complainant had contacted an EEO counselor within the 30-day limit) (emphasis added).

Second, nothing in either version of the regulation's language addresses the issue presented in this case: whether an agency's failure to dismiss an untimely claim at the administrative level precludes application of the time limit in a separate judicial proceeding. Courts have concluded, though, that petitioner's proposed interpretation of the regulation would "discourage administrative resolution of meritorious claims, which nevertheless are untimely." *Henderson* v. *United States Veterans Admin.*, 790 F.2d 436, 441 (5th Cir. 1986); see also *Brown* v. *Marsh*, 777 F.2d 8, 15 (D.C. Cir. 1985) (court is "loath to hold that mere investigation without more constitutes a binding waiver of any agency's right to raise the timeliness issue," because such a holding would discourage agencies from voluntarily investigating and resolving problems of discrimination).[3]

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[3] In any event, petitioner is ill-positioned to complain (Pet. 8-9) about a perceived lack of adherence to a timeliness rule that was in fact ultimately enforced in his case and that, if enforced by the agency as he wishes, would simply have extinguished his complaint sooner.

3. Finally, petitioner asserts (Pet. 10-12) that this Court should grant a writ of certiorari to reduce the burden of employment civil rights cases on federal courts. Petitioner's statistical speculation presents no proper basis for this Court's exercise of its certiorari jurisdiction.

Moreover, petitioner's proposal that agencies be held to have waived a timeliness defense to judicial proceedings by considering an administrative complaint on the merits may well increase, rather than reduce, court litigation. When an agency accepts an untimely complaint and makes a finding of discrimination, it cannot appeal its own decision to the district court. *E.g.*, *Boyd*, 752 F.2d at 413-414. Thus, when agencies investigate first and find discrimination, the dispute is generally resolved at the administrative level. On the other hand, if an agency rejects an administrative complaint on timeliness grounds, the claimant may challenge the agency's determination in district court. 29 C.F.R. 1614.408 (1996).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
*Acting Solicitor General*
FRANK W. HUNGER
*Assistant Attorney General*
MARLEIGH D. DOVER
STEPHANIE R. MARCUS
*Attorneys*

AUGUST 1997